

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 ROBERT L. SONDERFAN,)
10 Petitioner,) 3:06-cv-00108-LRH-RAM
11 vs.)
12 WASHOE COUNTY, *et. al.*,)
13 Respondents.)
/

15 This action is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by petitioner
16 Robert Sonderfan, who is represented by counsel. Before the Court is respondents' motion to
17 dismiss (docket #11).

18 | I. Procedural History

19 On September 15, 2002, petitioner was found guilty in the Justice Court of Reno Township,
20 in and for Washoe County, of Count I, improper outdoor storage, a misdemeanor. Exhibit 1.¹ The
21 justice court sentenced petitioner, on October 14, 2002, to serve one 180 days in the county jail, with
22 credit for one day previously served. *Id.* The sentence was suspended on condition that petitioner
23 clean up his property, and a review hearing was set for November 18, 2003. *Id.* Petitioner appealed
24 to the Second Judicial District Court of Nevada, and on January 9, 2006, the district court affirmed
25 petitioner's conviction. Petitioner's Exhibit 4. The case was remanded to the justice court, and on

¹ The exhibits cited in this order in the form “Exhibit ____,” are those filed by respondents in support of their motion to dismiss, and are located in the record at docket #11. The exhibits cited in this order in the form “Petitioner’s Exhibit ____,” are those filed by petitioner in support of his opposition to the motion to dismiss, and are located in the record at docket #12 and #13.

1 March 1, 2004, the court executed the sentence. *Id.*; Exhibit 1.

2 On April 13, 2006, petitioner filed a petition for writ of certiorari in the Nevada Supreme
 3 Court. Petitioner's Exhibit 6. Petitioner argued six claims for relief: (1) he was exempt from
 4 prosecution under the Nevada statutes and the county development code; (2) the evidence was
 5 insufficient to convict him, as the evidence proved that the outdoor storage of waste could be seen
 6 only from a private road; (3) the State violated the Nevada and United States Constitutions by
 7 prosecuting the case in the wrong venue; (4) the prosecution under the county development code
 8 violated his federal due process rights because the ordinance arbitrarily allows for enforcement
 9 through criminal means when the issue is a civil matter; (5) the prosecution was impermissible as the
 10 state and zoning board took positions factually contradictory to a previous prosecution of petitioner's
 11 neighbor for a similar offense; and (6) the trial court failed to dismiss the action when the county
 12 code enforcement officer did not give him an order to comply. Petitioner's Exhibits 6 and 7. The
 13 Nevada Supreme Court denied the petition for writ of certiorari on May 19, 2006. Petitioner's
 14 Exhibit 8.

15 On February 28, 2006, petitioner filed his federal habeas petition with this court (docket #1).
 16 Before the Court is a motion to dismiss (docket #11) filed by respondents.

17 **II. Respondents' Motions for Extensions of Time**

18 Between March 28 and June 18, 2007, respondents filed a series of three motions (docket #8,
 19 #9, #10) requesting extensions of time to respond to the habeas petition in this case.
 20 Respondents then filed their motion to dismiss on July 16, 2007, within the time contemplated by
 21 their third motion for extension of time. The Court finds that respondents' motions for extensions of
 22 time were made in good faith and not solely for the purpose of delay, and that there was good cause
 23 for the extensions of time respondents requested. The Court will grant those motions for extensions
 24 of time, and will treat the motion to dismiss as timely filed.

25 After petitioner filed an opposition to the motion to dismiss, respondents filed a motion for
 26 an extension of time for the reply in support of their motion to dismiss (docket #14). Respondents
 27 then filed their reply within the time contemplated by their motion for extension of time. The Court
 28 finds that respondents' motion for extensions of time for their reply was made in good faith and not

1 solely for the purpose of delay, and that there was good cause for the extension of time respondents
 2 requested. The Court will grant that motions for extension of time, and will treat the reply as timely
 3 filed.

4 **III. Motion to Dismiss**

5 Respondents move to dismiss the federal habeas petition on the grounds that the petition is
 6 unexhausted.

7 **A. Exhaustion of Claims**

8 A state prisoner must exhaust all available state remedies prior to filing a federal habeas
 9 corpus petition. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982). The state courts must be
 10 given a fair opportunity to act on each claim before those claims are presented in a habeas petition to
 11 the federal district court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). Furthermore, a claim
 12 will remain unexhausted until a petitioner has sought review from the highest available state court
 13 through direct appeal or collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916 (9th
 14 Cir. 2004).

15 A habeas petitioner must “present the state courts with the same claim he urges upon the
 16 federal court” in order to allow a state court to correct violations of federal rights. *Picard v. Connor*,
 17 404 U.S. 270, 276 (1971); *Duncan v. Henry*, 513 U.S. 364, 365 (1995). The federal constitutional
 18 implications of a claim, not just issues of state law, must have been raised in the state court to
 19 achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404
 20 U.S. at 276)). To achieve exhaustion, the state court must be “alerted to the fact that the prisoner [is]
 21 asserting claims under the United States Constitution.” *Duncan*, 513 U.S. at 365-66. See also
 22 *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (stating the “mere similarity between a claim of
 23 state and federal error is insufficient to establish exhaustion”).

24 Furthermore, a claim is not exhausted unless a petitioner has fairly presented to the state
 25 court the same operative facts and legal theory upon which his federal habeas claim is based.
 26 *Tamalini v. Stewart*, 249 F.3d 895, 898 (9th Cir. 2001) (citing *Bland v. California Dept. of*
 27 *Corrections*, 20 F.3d 1294, 1295 (9th Cir. 1982), overruled on other grounds by *Schell v. Witek*, 218
 28 F.3d 1017 (9th Cir. 2000) (*en banc*)). Exhaustion is not met if a petitioner presents to the federal

1 court facts or evidence which place the claim in significantly different posture than it was in the state
 2 courts, or where different facts are presented to the federal court to support the same theory.
 3 *Conrotto v. Newland*, 188 F.3d 512 (9th Cir. 1999); *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir.
 4 1988).

5 **B. Application to the Instant Case**

6 **1. Ground 1**

7 In his first claim for relief petitioner alleges that he is being held in violation of his
 8 5th and 14th Amendment due process rights, as the county code he was convicted of violating is
 9 arbitrary and capricious, in that it allows state officials impermissible discretion in determining
 10 whether to charge a person with a civil or criminal violation of the code. In the motion to dismiss,
 11 respondents argue that petitioner did not exhaust this claim, as he did not present it to the Nevada
 12 Supreme Court.

13 The Nevada Supreme Court, in *Zamarripa v. First Judicial District Court*, 747 P.2d
 14 1386 (Nev. 1987), acknowledges that review of a misdemeanor conviction may be had by appealing
 15 to the district court and then petitioning the Nevada Supreme Court for a writ of certiorari.

16 In his opposition to the motion to dismiss (docket #12), petitioner alleges first that he
 17 was not required to raise his claims in a petition for writ of certiorari to the Nevada Supreme Court,
 18 as such review is discretionary in nature. Respondents correctly argue in their reply (docket #15)
 19 that a misdemeanant appellant must still petition the state's highest court for review in order to
 20 exhaust claims for federal habeas corpus purposes. *Larche v. Simons*, 53 F.3d 1068, 1072
 21 (9th Cir. 1995) (stating petitioners convicted of misdemeanors must seek review from the highest
 22 state court "even when such review is discretionary" in order to comply with section 2254's
 23 exhaustion requirement).

24 However, petitioner also contends that if such review is required, then he has satisfied
 25 that requirement as he did petition the Nevada Supreme Court for review, and he raised the instant
 26 claim before that court. Petitioner did argue, in his petition to the Nevada Supreme Court, that his
 27 federal due process rights were violated because the county ordinance was arbitrary and contained no
 28 standards. Petitioner's Exhibits 1, 6, and 7. As petitioner raised the instant claim in the Nevada

1 Supreme Court, and indicated that the claim was a federal claim, it appears that the claim was
 2 properly exhausted. *See Lyons v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *as modified by* 247
 3 F.3d 904 (9th Cir. 2001).

4 Respondents argue that if this claim is considered exhausted, petitioner is still not
 5 entitled to federal habeas relief as petitioner really raises a question of state law that is merely
 6 couched in terms of a federal right. When a state interprets its own laws or rules, no basis for federal
 7 habeas corpus relief is presented, as no federal constitutional question arises. *Burkey v. Deeds*, 824
 8 F. Supp. 190, 192 (D. Nev. 1993) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *Oxborrow*
 9 *v. Eikenberry*, 877 F.2d 1395 (9th Cir. 1999) (“errors of state law do not concern us unless they rise
 10 to the level of a constitutional violation”). In his habeas petition, however, petitioner clearly
 11 articulates federal constitutional bases for Ground 1.

12 **2. Ground 2**

13 Petitioner alleges in his second claim that he is being held in violation of his 5th, 6th,
 14 and 14th Amendment rights and in violation of Article III of the United States Constitution as the
 15 action below was not heard in the proper venue. Respondents argue that this claim was not
 16 exhausted, as petitioner has not shown that he presented this claim to the Nevada Supreme Court.
 17 In his opposition to the motion to dismiss, petitioner argues, similar to his argument regarding
 18 Ground 1, that he was not required to raise this claim to the Nevada Supreme Court, and even if he
 19 was, that he did include this claim in his petition for writ of certiorari to that court.

20 While petitioner was convicted of a misdemeanor, he still was required to petition the
 21 Nevada Supreme Court for review, in order to exhaust his claims for federal habeas corpus purposes.
 22 *Larche v. Simons*, 53 F.3d 1068, 1072 (9th Cir. 1995). Petitioner argued to the district court that
 23 venue was improper without citing to any federal rights or raising any federal claims. Petitioner’s
 24 Exhibit 1. In his petition to the Nevada Supreme Court, petitioner again raised his improper venue
 25 argument, stating that proper venue is mandated by Article III of the United States Constitution.
 26 Petitioner’s Exhibit 7.

27 Petitioner cannot meet the requirements for exhaustion by raising his federal claim for
 28 the first time on discretionary review in the Nevada Supreme Court. *Castille v. Peoples*, 489 U.S.

1 346, 351 (1989) (“submission of a new claim to a State’s highest court on discretionary review” does
 2 not constitute a fair presentation of the claim under the requirements of exhaustion when “the claim
 3 has been presented for the first and only time in a procedural context in which its merits will not be
 4 considered unless ‘there are special and important reasons’”); *Knight v. White*, 122 F.3d 1072 (9th
 5 Cir. 1997). Ground 2 is unexhausted.

6 **3. Ground 3**

7 Petitioner argues in his third ground for relief that he was convicted in violation of his
 8 5th, 6th and 14th Amendment rights because he was exempt from prosecution, in that he used his
 9 property consistently with the Washoe County Development Code for agricultural purposes. In the
 10 motion to dismiss, respondents argue that petitioner did not present this claim to the Nevada
 11 Supreme Court.

12 While petitioner filed a petition for certiorari in the Nevada Supreme Court, he did
 13 not, in that petition, raise the instant claim as a federal claim. Petitioner’s Exhibit 7. In the petition
 14 for writ of certiorari, petitioner argued that he used his property agriculturally, and this was
 15 consistent with state and local law. *Id.* Moreover, petitioner only generally argued that there were
 16 due process concerns, without raising any specific federal constitutional issues. *Id.* The United
 17 States Supreme Court has stated that a petitioner’s claim for relief in the state courts “must include
 18 reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle
 19 the petitioner to relief.” *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). “[G]eneral appeals to
 20 broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are
 21 insufficient to establish exhaustion.” *Hiiwala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999), *cert.*
 22 *denied*, 529 U.S. 1009 (2000).

23 As petitioner’s claim in the Nevada courts did not include specific reference to a
 24 federal constitutional guarantee, Ground 3 is unexhausted.

25 **4. Ground 4**

26 In his fourth claim for relief, petitioner alleges his conviction violates his 5th, 6th and
 27 14th Amendment rights to due process of law because he could not be convicted of improperly
 28 storing waste on a public street. Again, the respondents argue in the motion to dismiss that petitioner

1 did not present the claim to the Nevada Supreme Court. Similar to Ground 3, petitioner did file a
 2 petition for writ of certiorari with the Nevada Supreme Court. Petitioner's Exhibit 7. However,
 3 petitioner argued only state law issues with respect to this claim. Petitioner contended that he could
 4 not be convicted of storing waste visible from a public street under a proper interpretation of the
 5 county development code and the Nevada statutes. Petitioner's Exhibit 7.

6 Ground 4 is unexhausted because petitioner failed to raise a challenge based on a
 7 federal constitutional right in state court. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (stating a
 8 claim for relief "must include reference to a specific federal constitutional guarantee, as well as a
 9 statement of the facts that entitled petitioner to relief") (citations omitted).

10 **C. Petitioner's Election**

11 The Court finds Grounds 2, 3, and 4 are unexhausted in state court. Consequently,
 12 the Court finds the petition in this action to be a "mixed" petition – one containing both claims
 13 exhausted in state court and claims not exhausted in state court. Under the circumstances, the Court
 14 will require petitioner to make an election. Petitioner must do one of the following: (1) abandon the
 15 unexhausted claims (Grounds 2, 3, and 4), and proceed only on the exhausted claim (Ground 1); or
 16 (2) move for a stay of this action, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), so that he may
 17 return to state court and exhaust his unexhausted claims.

18 In *Rhines*, the Supreme Court placed limitations upon the discretion of district courts to
 19 facilitate habeas petitioners' return to state court to exhaust claims. The *Rhines* Court stated:

20 [S]tay and abeyance should be available only in limited
 21 circumstances. Because granting a stay effectively excuses a petitioner's
 22 failure to present his claims first to the state courts, stay and abeyance is
 23 only appropriate when the district court determines there was good cause
 24 for the petitioner's failure to exhaust his claims first in state court.
 25 Moreover, even if a petitioner had good cause for that failure, the district
 court would abuse its discretion if it were to grant him a stay when his
 unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2)
 ("An application for a writ of habeas corpus may be denied on the merits,
 notwithstanding the failure of the applicant to exhaust the remedies
 available in the courts of the State").

26 544 U.S. at 277. In view of *Rhines*, if petitioner wishes to return to state court to exhaust his
 27 unexhausted claims, he must make a showing of good cause for his failure to exhaust his claims, and
 28 he must show that his claims are not plainly meritless.

1 **IT IS THEREFORE ORDERED** that respondents' motions for extensions of time (docket
2 #8, #9, #10, and #14) are **GRANTED**. Respondents' motion to dismiss and respondents' reply in
3 support of their motion to dismiss shall be treated as timely filed.

4 **IT IS FURTHER ORDERED** that respondents' Motion to Dismiss (docket #11) is
5 **GRANTED IN PART AND DENIED IN PART.** The court finds that Ground 1 is exhausted, and
6 that Grounds 2, 3, and 4 are unexhausted.

7 **IT IS FURTHER ORDERED** that, no later than **May 2, 2008**, petitioner shall do one of the
8 following: (1) file and serve a Notice of Abandonment of Claims, stating that he wishes to abandon
9 Grounds 2, 3, and 4, and proceed only on Ground 1; or (2) file and serve a Motion for Stay,
10 requesting a stay of this action, and attempting to make the required showing for such a stay,
11 pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), so that he may return to state court and exhaust
12 his unexhausted claims.

13 **IT IS FURTHER ORDERED** that, if petitioner files and serves a Motion for Stay,
14 respondents shall have **30 days** to respond to such motion, and petitioner shall thereafter have
15 **30 days** to reply.

16 **IT IS FURTHER ORDERED** that, if petitioner files and serves a Notice of Abandonment
17 of Claims, abandoning Grounds 2, 3, and 4, respondents shall have **30 days** to file an Answer,
18 responding to Ground 1, and petitioner shall thereafter have **30 days** to file a Reply.

19 DATED this 27th day of March, 2008.

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**LARRY R. HICKS
UNITED STATES DISTRICT JUDGE**